Supreme Court, U.S.
FILED

011362 MAR 7 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

TAREK ELAGAMY,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS PERRILL ADAMS
631 St. Charles Avenue
New Orleans, LA 70130
Telephone (504) 523-3815

Attorney for Petitioner

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

38PP

QUESTION PRESENTED

The question presented is:

Whether the "stop-time" provision of section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), as amended by section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), applies to deportation proceedings that became administratively final before the IIRIRA effective date?

PARTIES TO THE PROCEEDINGS

1. Hon. John Ashcroft, U.S. Attorney General

2. Michael T. Dougherty, Esq., Office of Immigration Litigation, U.S. Department of Justice

3. Christine Davis, District Director, U.S. Immigration and Naturalization Service, New Orleans District Office

4. Petitioner Tarek Elagamy

TABLE OF CONTENTS

Page

Question Presented.....i

Parties to the Proceedings.....ii

Table of Contents.....iii

Table of Authorities.....iv

Opinions and Judgments Below.....2

Statement of Jurisdiction.....2

Statutes Involved.....3

Statement of the Case.....4

I. Statement of Facts.....4

II. Proceedings Below.....5

III. Basis for Federal Jurisdiction in the Court of First Instance.....6

Reasons for Granting the Writ.....7

Appendix.....A-1

TABLE OF AUTHORITIES

Page

CASES:

Astrero v. INS, 104 F.3d 264 (9th Cir. 1996).....6,7

Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000).....7

Gonzalez-Torres v. INS, 213 F.3d 899 (5th Cir. 2000).....6

Guadalupe-Cruz v. INS, 240 F.3d 1209 (9th Cir. 2001)....7

Otarola v. INS, 270 F.3d 1272 (9th Cir. 2001).....7

FEDERAL STATUTES:

United States Code:

former 8 U.S.C. Sect. 1105a(a).....6

former 8 U.S.C. Sect. 1254(a)(2).....3

8 U.S.C. Sect. 1158.....5

8 U.S.C. Sect. 1251(a)(5).....5

28 U.S.C. Sect. 1254(1).....2,5

Other:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").....3

Nicaraguan Adjustment and Central American Relief Act ("NACARA").....3

COURT RULES:

SUP. CT. R. 13.....2

No. _____

In The
Supreme Court of the United States

TAREK ELAGAMY,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner Tarek Elagamy respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of

the United States Court of Appeals for the Fifth Circuit entered in this matter on November 29, 2001.

OPINIONS AND JUDGMENTS BELOW

The order of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on January 29, 2002, denying rehearing, is reprinted in the Appendix to this Petition at page A-24. The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on November 29, 2001, are reprinted in the Appendix to this Petition at pages A-21 through A-23. The decision and order of the Board of Immigration Appeals, filed March 17, 1997, are reprinted in the Appendix at pages A-18 through A-20 . The decision and order of the Board of Immigration Appeals, filed February 5, 1995, are reprinted in the Appendix at pages A-14 through A-17. The decision and order of the Board of Immigration Appeals, filed June 24, 1992, are reprinted in the Appendix at pages A-9 through A-13. The decision and order of the Immigration Judge, filed April 20, 1988, are reprinted in the Appendix at pages A-1 through A-8.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 29, 2001, and rehearing was denied on January 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 13.

STATUTES INVOLVED

This case involves section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), as amended by section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"):

> Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of enactment of this Act.

In addition, this case involves former 8 U.S.C. Sect. 1254(a)(2):

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(4)(D)) who applies to the Attorney General for suspension of deportation and-
> (...)

> (2) is deportable under paragraph (2), (3), or (4) of section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner Tarek Elagamy is a native and citizen of Egypt. Certified Administrative Record ("A.R."), as filed with the U.S. Court of Appeals for the Fifth Circuit in Case No. 97-60211, at 750, 791. On May 15, 1982, he was admitted to the U.S. as a nonimmigrant student. A.R. 8, 790.

On September 10, 1986, Mr. Elagamy was convicted in the United States District Court for the Eastern District of Louisiana for having made a false statement under oath, under 18 U.S.C. Sect. 1546, regarding his marriage to a U.S. citizen. A.R. 8, 633, 742, 790-91. He was sentenced to five years' imprisonment (suspended), and placed on five years of active probation. A.R. 742.

II. Proceedings Below

INS issued an Order to Show Cause ("OSC") in Mr. Elagamy's case on December 17, 1986, charging him with deportability under former 8 U.S.C. Sect. 1251(a)(5). At a final administrative hearing held on April 20, 1988, Mr. Elagamy was found deportable as charged by an Immigration Judge ("IJ"). The IJ also denied his claim to political asylum under 8 U.S.C. Sect. 1158. A.R. at 684-91.

On June 24, 1992, the Board of Immigration Appeals ("BIA") dismissed Mr. Elagamy's appeal from the IJ's decision. A.R. 616-18. A motion to reopen was filed with the BIA on August 9, 1993, claiming eligibility for suspension of deportation under former 8 U.S.C. Sect. 1254(a)(2), which, as set forth above, requires a showing of ten years' residence and good moral character during said period. Mr. Elagamy argued that the offense that led to his conviction and deportability had been committed over ten years earlier, thus satisfying the statutory threshold. A.R. 463. The BIA denied reopening on February 9, 1995, holding that the requested relief was available only where ten years of good character had elapsed after the conviction date, not the date of commission of the offense. A.R. 432.

On September 16, 1996, Mr. Elagamy again moved for reopening, noting that his conviction was then over ten years old, and asking again for suspension of deportation. The BIA denied this motion on March 17, 1997, this time based on the "stop-time" rule of IIRIRA Sect. 309(c)(5), which, as quoted above, states that the accumulation of residence and good character time periods is cut off upon issuance of the OSC. The BIA applied this rule to Mr. Elagamy,

even though the IIRIRA effective date of April 1, 1997 had not yet then been reached. A.R. 2-3. The BIA noted that one Federal Court had held this impermissible in Astrero v. INS, 104 F.3d 264 (9th Cir. 1996), but refused to follow Astrero outside the Ninth Circuit. A.R. 3.

Mr. Elagamy filed a Petition for Review with the U.S. Fifth Circuit Court of Appeals, arguing inter alia that under Astrero he was suspension-eligible. On November 29, 2001, the Fifth Circuit upheld Mr. Elagamy's deportation order, holding in an unpublished decision that his Astrero argument was foreclosed by its own precedent in Gonzalez-Torres v. INS, 213 F.3d 899 (5th Cir. 2000). See Appendix. Rehearing was denied without discussion on January 29, 2002; issuance of the mandate was stayed, however, until March 7, 2002, pending filing of the present petition. See Appendix.

III. Basis for Federal Jurisdiction in the Court of First Instance

Tarek Elagamy herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under former 8 U.S.C. Sect. 1105a(a), which established the exclusive procedure for judicial review of such administrative decisions under then-applicable law.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT

This Court should grant certiorari in this case in order to correct the nationwide conflict caused by the BIA's failure to follow Astrero outside the Ninth Circuit, and by the conflict found by the Fifth Circuit in the present case between Astrero and its decision in Gonzalez-Torres, supra.

The Ninth Circuit has followed Astrero repeatedly and consistently. See, e.g., Otarola v. INS, 270 F.3d 1272 (9th Cir. 2001), Guadalupe-Cruz v. INS, 240 F.3d 1209 (9th Cir. 2001), and Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000). The Fifth Circuit, as noted, found in the present matter that Gonzalez-Torres was controlling precedent contrary to Astrero. Petitioner maintained below, and still believes, that these two decisions are readily distinguishable. If the Fifth Circuit's position be accepted, however, there is a direct conflict between the Fifth and Ninth Circuits on this issue.

A nationwide conflict exists in any event, as the BIA emphatically refuses to follow Astrero and progeny outside the Ninth Circuit. The fact that there are at least four published opinions (as cited above) on this issue since 1996 shows that this is not a trivial or seldom-encountered controversy. This Court should therefore intervene by granting certiorari, in order to ensure the uniform application of law throughout the country.

Respectfully submitted,

THOMAS PERRILL ADAMS
631 St. Charles Avenue
New Orleans, LA 70130
Telephone (504) 523-3815

Attorney of Record for
Petitioner Tarek Elagamy

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New Orleans, Louisiana

File No.: A 26 440 666 April 20, 1988

In the Matter of:	)	
	)	
TAREK ELAGAMY	)	IN DEPORTATION
	)	PROCEEDNGS
Respondent	)	

CHARGE: Section 241(a) (5) of the Immigration and Nationality Act in which you have been convicted under Section 1546 of Title 18 of the United States Code.

APPLICATION: Political asylum; Withholding of deportation, pursuant to 243(h) and 208 of the immigration and Nationality Act.

ON BEHALF OF RESPONDENT:

David A. Kattan, Esquire
Tom Adams, Esquire
419 Gravier Street
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE:

Clarisss Muller, Esquire
INS/Trial Attorney
New Orleans, Louisiana

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 39 year old married male native and citizen of Egypt, pursuant to Order to Show Cause. Respondent is alleged to have entered the United States at New York, New York, on or about the 15th of May, 1982. The respondent was convicted in the United States District Court, Eastern District of Louisiana for Section 1546 of Title 18 of the United States Code. The respondent admitted some of the allegations in the Order to Show Cause, however, contested the matter of conviction and the charge. Deportability was established which is clear, convincing and unequivocal. The respondent designated the Honduras as the country of deportation and asked for the relief in the form of political asylum, withholding of deportation and adjustment of status. In view of the fact that the respondent does not have an approved 1-130 the adjustment of status is no longer before this Court. It is noted for the record that this proceeding, this matter of this record, was destroyed in a fire that took place in the Oakdale Alien Detention Facility in the latter part of November, 1987, when the fire consumed the entire facility to include the Court building. All the records of the Court were destroyed and this is one of the records that was destroyed. The proceeding was started anew. The order to Show Cause is a copy as are some other documents in the record. The applicant filed the application for relief, 589, and supporting documents were forwared to the

State Department for an advisory opinion. That advisory opinion will be found in Exhibit 4. Exhibit 5 in this case is the conviction record, number 6 is the indictment. The hearing on the merits of the relief application took place on the 20th day of April, 1988 in New Orleans, Louisiana. At that hearing the respondent testified that he was born in Cairo, Egypt and that he received his Bachelor of Science degree in accounting at Ain Shams University in Egypt with a B.S. in accounting. The respondent came to the United States to seek a masters Degree in business in accounting, however, the respondent did not complete his education for higher learning in the United States.

The respondent subsequently married, divorced, and is now married to his current wife. The respondent's wife is a Christian, she has two children by a previous marriage and respondent testified that if he returns to Egypt with his Christian wife she will have a hard time in Cairo. He points out that Egyptians don't like Christians as they are members of the Moslem faith and if he goes back he will be rejected by his family and his family has informed him that he will not be able to live in the house. The housing situation in Cairo is critical and in Egypt is critical and therefore the respondent will have difficulty in finding a home, won't be able to live at his house, he can't afford housing and he will incur some discrimination. The respondent's wife is a non-believer or some would call an infidel. There are some Moslem fanatics who are against U.S. people and also against people of the Moslem faith marrying Christians. The respondent, himself, is a self proclaimed Moslem fanatic and he says as a result of the fact that he is and he has married a Christian, this would put him in some

difficulties. He states that he would face persecution and most certainly discrimination should he return home. probably from the government. He states that his step-children may stay in the United States because their father does not like him being a Moslem and would probably not allow them to go to Egypt and if they did they would not be discriminated in school, however, they would find it difficult. He also states that there are four reigning groups in his country that don't like Americans and also states the fact that President Sadat was assassinated and probably because of his ties with America. The respondent has evidently been told by his parents that he can't live in his home with his Christian wife.

However, to establish eligibility for withholding of deportation pursuant to Section 243 (h) of the Act. An alien must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. An alien must show that it is more likely than not that he would be subject to persecution on one of the grounds specified.

An application for asylum under Section 208 must meet the definition of a refugee which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group or political opinion. The statutory standard requires the alien to show that he possesses a well-founded fear of persecution by establishing a reasonable person in circumstances would fear persecution if he were to be returned to his native country. A reasonable person may well fear persecution even where it is likely

significant and clearly probable. It is noted that the well-founded fear standared requires a lesser degree of proof than the clear probability standard. In this particular case, the respondent bases his application upon the fact that he is a Moslem, the fact that he is now married to a Christian and as a result of this that people will discriminate and persecute him based on this marriage.

However, the respondent does bear the burden of proof in both the asylum and withholding applications to establish by evidence that he has a well-founded fear of persecution or that his life or freedom would be threatened on any of the five grounds of persecution previously enumerated in 8 C.F.R. 208.5. Now in this particular case the respondent has not stated that he has ever been persecuted or that any acts of persecution have been directed against him to date. It appears that respondent's fears and concerns right now are speculative in nature. The respondent has stated that his family would possibly turn him out and that he would face discrimination as a result of his marriage to his wife and possibly persecution. There are fanatic groups also there.

Now a showing of a well-founded fear of persecution usually requires the alien to present some objective evidence which establishes a realistic likelihood of persecution. The aliens own subjective speculations and conclusional statements unsupported by independent corroborative evidence usually will not suffice. However, if the alien's testimony is believable, consistent, sufficiently detailed to provide a plausible and coherent account of the basis for this fear this will be sufficient. In this case, the respondent's story is less than coherent, and sufficiently detailed to

provide a plausible basis for that fear. The respondent states that he is married to a Christian, however, as he testifies it seems that there would be little difference in his case to think that he would face anymore discrimination then that faced by those in America who may bring home a Korean wife or a Jewish individual who marries a Christian or Christian marries a Jew or Protestant who married a Catholic or a Catholic who marries a Protestant or vice versa. Any time an individual marries another individual of a different culture as well as that of a different religion may certainly face some discrimination or different way of life. It would be difficult for anyone when they have two different cultures and two different faiths to make a successful marriage. However, the respondent states that his family would not accept him because of his Christian wife. That is not unusual for any family in America that the respondent would be returned home with the wife and child, the parents would turn him out. I know that usually an individual, when he gets married, is expected to live on his own and certainly not move in with the family. So I can't see that the respondent in this particular case would be any different from any other individual of the world where be would have to be expected to support his own wife and family.

The respondent testified that he may be possibly subjected to persecution and discrimination but he is not specific and talks about probability and possibilities. As I stated earlier, the burden of proof is upon the respondent to show that he faces a clear probability of persecution in his country, which in this case is Eqypt, on account of race which is not a factor, nationality and certain not membership in a particular social group, political opinion appears to be only

be because his wife is a member of the Christian faith. Certainly the Court would conclude that no reasonable person in the respondent's shoes would fear persecution if he were to go to Egypt with a Christian family. He may face the same luck as anyone who brings home a foreign born wife whether it be in World War 11, Korea or Viet Nam. However, this certainly would not be persecution.

The court just cannot conceive how the respondent's assertions in Court could ever meet the standards of persecution set forth in 208 and 243 (h). It appears that the respondent's case is woefully inadequate and therefore does not meet the standards set forth by 208 and 243 (h).

Again, it is noted from the Country Rights Reports On Human Practices, 1987, that the Constitution of Egypt states it is an Islamic state which provides for freedom of religious expression and equality before the law regardless of religion. Egypt has a tradition of religious toleration and the authorities generally uphold the rights of religious minorities. Even Egyptian Jews who immigrated there years ago appear to be able to practice their faith without restrictions or harrassments. Synagogues and churches are routinely provided police protection. Various Protestant sects operate with significant Egyptian membership, while it does have smaller followers. Accordingly, it certainly appears that the respondent's fears would be speculative and without basis. Therefore, I find that the respondent is certainly not eligible for withholding and asylum. The respondent, because of his conviction, would not be eligible for voluntary departure and because of the fact that respondent does not have an approved 1-130 is certainly ineligible at this time for adjustment of status.

Therefore, it is ORDERED that the request for political asylum, withholding of deportation pursuant to Section 208, 243 (h) be denied and that the respondent be deported from the United States to Egypt on the charge contained in the Order to Show Cause.

/s/ R. Kevin McHugh
R. KEVIN McHUGH
Immigration Judge

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A26 440 666 - New Orleans Date: JUN 24 1992

In re: TAREK ELAGAMY

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

David Kattan, Esquire
419 Gravier Street
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE:

Richard Robinson
General Attorney

CHARGE:

Order: Sec. 241(a)(5), I&N Dec. [8 U.S.C. § 1251(a)(5)] - Convicted under section 1546 of Title 19 of t the United States Code

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. The decision of the immigration judge

dated April 20, 1988, finding the respondent deportable pursuant to section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. S 1251(a)(5), and denying his application for asylum and withholding of deportation pursuant to sections 208(a) and 243(h) of the Act, respectively, is affirmed.

The respondent testified that he feared returning to Egypt because he had married a United States citizen who is a Christian. In this regard, the respondent testified that there is a lot of anti-American sentiment in Egypt, and that both of them would face discrimination and persecution in Egypt by the government and by Moslem fanatics - he for marrying a "non-believer," and his wife for being American and a Christian.

In denying the respondent's application for asylum and withholding of deportation, the immigration judge found the respondent's fears of persecution by the Egyptian government or Moslem fanatic groups to be speculative, and that while the respondent may face a certain amount of discrimination for marrying a Christian, such discrimination for marrying persons from different cultures or races widely exists in most countries, including the United States. The immigration judge took cognizance of the 1987 Department of State's Country Reports on Human Rights Practices in Egypt, noting that Egypt's constitution provides for freedom of religion and equality before the law regardless of religion, and that the country has a history of religious tolerance. The immigration judge then denied the respondent's application for voluntary departure based on the respondent's 1986 conviction.

On appeal, the respondent alleges that the immigration judge erroneously refused to order his deportation to Honduras after the respondent designated Honduras as country of deportation; erred by refusing to continue his deportation hearing to allow the respondent to appeal the district director's revocation of his approved immediate relative visa petition, or to present evidence that his marriage was bona fide; erred in finding that the respondent had not established a well-founded fear of returning to Egypt based on his marriage to a United States citizen, who is a Christian.

We have applied the applicable standards of proof set forth in Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), to the facts of this case and agree with the immigration judge that the respondent has failed to establish either a well-founded fear of persecution or a clear probability of persecution in returning to Egypt.

We find the respondent's testimony to be cursory and vague, and unsubstantiated in its entirety. The respondent referred to "Moslem fanatics" that might object to his marriage, and also referred to possible government persecution on the same basis. However, except for the respondent's cursory testimony, there is no evidence of record that the government of Egypt persecutes its citizens on the basis of religion, or that the Egyptian government either tolerates or would be unable to control any group or groups of Moslem zealots who would wish to harm the respondent on account of his marriage. In actuality, it is apparent that the respondent really fears ostracism from his family and the reality of the hardships in Egypt for marrying a person from a different culture with different religious beliefs. However,

as the immigration judge pointed out, such recriminations are not persecutory in nature, but are based on prejudice, bigotry, and an intolerance for cultural diversity, for which the Act will not afford its protections. In effect, the respondent has not rebutted the State Department's Advisory Opinion which opines that the respondent has not presented any evidence that he faces the likelihood of persecution upon his return to Egypt. 8 C.F.R. § 208.10(b) (1988).

Next, we agree with the immigration judge that the respondent was raising an issue collateral to his deportation proceedings when he wished to continue his hearing in order to appeal the district director's revocation of his approved immediate relative visa petition. In essence, even having an approved visa petition vests no rights in the alien in remaining in the United States, and does not prevent the deportation of the alien. See Perales v. Casillas, 903 F.2d 1043 (5th Cir. 1990); Matter of Merced, 14 I&N Dec. 644 (BIA 1974). See also Oluyemi v. INS, 902 F.2d 1032 (lst Cir. 1990); Joseph v. Landon, 679 F.2d 113 (7th Cir. 1982); Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979).

Finally, we agree with the respondent that the immigration judge erred in ordering his deportation to Egypt. We note that the respondent requested deportation to Honduras. While the respondent has no ties to that country, section 243(a) of the Act, 8 U.S.C. § 1253(a), allows an alien to designate any country of deportation unless such designation is prejudicial to the interests of the United States. The Service has shown no such prejudice. Consequently, the Board will designate Honduras as the country of deportation in this case.

Accordingly, based on the foregoing, the appeal is dismissed.

FURTHER ORDER: The respondent is ordered deported to Honduras pursuant to section 241(a)(5) of the Act, as charged.

FURTHER ORDER: In the event Honduras does not accept the respondent, the respondent is ordered deported to Egypt.

/s/ David L. Milhollan
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Va. 22041

- -

File: A26 440 666 – New Orleans Date: FEB 9 1995

In re: TAREK ELAGAMY

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF
RESPONDENT: Lawrence B. Fabacher II, Esquire
Gill & Fabacher
833 Baronne Street
New Orleans, Louisiana 70113

ON BEHALF OF
SERVICE: Agnelis L. Reese
General Attorney

CHARGE:

Order: Sec. 241(a)(5), I&N Act [8 U.S.C. S 1251(a)(5)]-
Convicted under 18 U.S.C. § 1546

APPLICATION: Reopening

The respondent filed a motion requesting the Board to reopen his deportation hearing in order to apply for suspension of deportation pursuant to section 244(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(2). The motion to reopen will be denied.

In support of his motion to reopen, the respondent submitted an Application for Suspension of Deportation (Form I-2§6A), a letter dated February 25, 1993, from the City of Lafayette Police Department, a copy of his marriage certificate, three affidavits from individuals attesting to his good moral character, and twenty- seven letters from business associates attesting to his good moral character. The respondent also submitted, inter alia, an estimate of his business investments in the United States and a copy of his certificate of trade name (Quality Oil Change & Tune-up).

A motion to reopen must, among other things, state new facts to be considered at the reopened hearing and must be supported by previously unavailable, material evidence. See 8 C.F.R. §§ 3.2, 3.8(a), 242.22. The alien also must establish prima facie eligibility for the relief sought before a motion to reopen will be granted. INS v. Doherty, U.S. _, 112 S.Ct. 719 (1992); INS v. Abudu, 485 U.S. 94 (1988); Matter of Ruiz, interim Decision 3116 (BIA 1989). The Board has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief. INS v. Doherty, supra. Moreover, a party who seeks to reopen proceedings bears a "heavy burden" of proving that if the proceedings before the immigration judge were reopened, the new evidence would likely change the result in the case.

See Matter of Coelho, Interim Decision 3172 (BIA 1992); see also INS v. Doherty, supra; INS v. Abudu, supra.

The record reflects that the respondent was convicted on September 10, 1986, under 18 U.S.C. § 1546 (Exh. 5). On April 20, 1988, an immigration judge found the respondent deportable as charged under section 241(a)(5) of the Act, 8 U.S.C. § 1251(a)(5). [1] As a result of the respondent's criminal offense he is ineligible for suspension of deportation unless he qualifies under section 244(a)(2) of the Act. In order to demonstrate statutory eligibility for suspension of deportation under section 244(a)(2) of the Act, the respondent must establish that he:

> has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act . . . constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien . . . .

We have held that the 10-year period is measured trom the date of the conviction. See Matter of Lozada, 19 1&N Dec. 637, 640 (BIA 1988) ; Matter of P-, 6 I&N Dec. 788 (BIA 1955) ; see also Brown v. INS, 856 F.2d 728, 731 (5th Cir. 1988). However, in a supplemental brief in support of

---

[1] This provision has been revised and redesignated as section 241(a)(3)(B)(iii) by section 602(a) of the Immigration Act of 1990, 104 Stat. at 5080

the motion to reopen, counsel for the respondent argues that our holding in Lozada, supra, is incorrect and leads to a harsh result. Counsel's argument that the 10-year period should be measured from the commission of the offense instead of the date of the conviction is unpersuasive. Although the commission of the act may have occurred in 1983, it did not become "a ground for deportation" until the respondent was convicted of that act on September 10, 1986. See section 241(a)(5) of the Act. Therefore, 10 years from the date of the conviction constituting the ground of deportation have not yet elapsed.

Accordingly, although we note the many positive character references included in the respondent's motion, the respondent is unable to demonstrate statutory eligibility for reopening. Therefore, it would serve no purpose to reopen this record to permit him to apply for suspension of deportation.

Accordingly, based on the foregoing, the motion to reopen will be denied.

ORDER: The motion to reopen is denied.

/s/ Mary M. Dunne
FOR THE BOARD

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A26 440 666 - New Orleans Date: MAR 17 1997

In re: TAREK ELAGAMY

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF
RESPONDENT: Lawrence B. Fabacher 11, Esquire
833 Baronne Street
New Orleans, Louisiana 70113

CHARGE:

Order: Sec. 241(a)(5), I&N Act [8 U.S.C. § 1251(a)(5)]-
Convicted under 18 U.S. C. § 1546

APPLICATION: Reopening

ORDER:

PER CURIAM. In a decision dated April 20, 1988, an Immigration Judge denied the respondent's application for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h). In a decision dated

June 24, 1992, we affirmed the Immigration Judge's decision. The respondent filed a motion to reopen to apply for suspension of deportation under section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2). In a decision dated February 9, 1995, we denied the motion to reopen. The respondent now submits another motion to reopen to apply for suspension of deportation. The Immigration and Naturalization Service has not responded. The motion will be denied.

We may deny a motion to reopen that fails to establish a prima facie case for the relief sought. See INS v. Doherty, 502 U.S. 314 (1992); Matter of L-O-G-, Interim Decision 3281 (BIA 1996). In order to qualify for suspension of deportation, an alien must establish that he has been physically present in the United States for a continuous period of at least 10 years, that he has been a person of good moral character during such period, and that his deportation would result in exceptional and extremely unusual hardship to himself or to his spouse, parent, or child who is a citizen or lawful permanent resident of the United States. See section 244(a)(2) of the Act.

We find that Matter of N-J-B-, Interim Decision 3309 (BIA 1997), controls the outcome of this case. In Matter of N-J-B, supra, we held that the under the provisions of the Illegal Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat.. 3009, __ ("IIRIRA"), service of the Order to Show Cause ends the period of continuous physical presence for suspension of deportation

purposes. [1] Inasmuch as the respondent was served with an Order to Show Cause prior to his acquisition of the 10 years' continuous physical presence, he is ineligible for suspension of deportation.

Accordingly, the motion is denied.

/s/ illegible
FOR THE BOARD

---

1 Although the United States Court of Appeals for the Ninth Circuit held in Astrero v. INS, 104 F.3d 264 (9th Cir. 1996), that the provisions of section 309(c)(5) of the IIRIRA do not apply until April 1, 1997, we decided in N-J-B- not to follow the Astrero holding outside the Ninth Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED NOV 29, 2001

No. 97-60211
Summary Calendar

TAREK ELAGAMY,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A26 440 666

Before DAVIS, BENAVIDES and STEWART,
Circuit Judges.
PER CURIAM:*

Tarek Elagamy has filed a petition for review of the Board of Immigration Appeals, ("BIA") order denying his motion to reopen deportation proceedings. Elagamy argues that the BIA erred in determining that he was not entitled to

* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR R. 47.5.4.

suspension of deportation because he had been served with an order to show cause prior to acquiring ten years of physical presence in the United States following his conviction for knowingly making a false statement under oath in connection with a visa application. Specifically, Elagamy contends that: (1) the BIA incorrectly decided In re N-J-B, Int. Dec. 3309 (BIA 1997) so that the stoptime rule of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), as amended by the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), does not end an alien's physical presence with the service of an order to show cause; (2) even if In re N-J-B was correctly decided, it does not prevent him from beginning a new residence period after the Order to Show Cause has been issued; and (3) the BIA erred in retroactively applying the IIRIRA's stoptime rule to his case.

This court reviews the BIA's legal determinations de novo. See Carbajal-Gonzalez v. INS, 78 F.3d 194, 197 (5th Cir. 1996). Elagamy does not provide any analysis or cite to any legal authority in support of his first argument. Accordingly, this argument is deemed abandoned. See American States Ins. Co. V. Bailey, 133 F.3d 363, 372 (5th Cir. 1998); see Also Yohey v. Collins, 985 F.2d 222, 225 (5th Cir, 1993)(only issues presented and argued in the brief are addressed on appeal).

Elagamy's second argument was rejected in McBride v. INS, 238 F.3d 371, 376-77 (5th Cir. 2001), which upheld a BIA ruling providing that the stop-time rule prohibits the restarting of the accrual time-period after deportation proceedings have begun, that the issuance of a show-cause order tolls the physical presence period in a

suspension-of-deportation case. Elagamy's contention that the stop-time provisions should not be retroactively applied to his case has likewise been foreclosed by Gonzalez-Torres v. INS, 213 F.3d 899, 903 (5th Cir. 2000), in which we held that the IIRIRA's tolling provision applies to show-cause orders in deportation proceedings, like in Elagamy's case, that were pending at the time the IIRIRA was enacted.

Elagamy's petition for review is DENIED.

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 97-60211

Filed Jan 29, 2002

TAREK ELAGAMY

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING

Before DAVIS, BENAVIDES, and STEWART,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is

denied -

ENTERED FOR THE COURT

/s/ W. E. Davis
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 17 2002

No. 01-1362

In the Supreme Court of the United States

TAREK ELAGAMY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
LINDA S. WERNERY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination of the Board of Immigration Appeals (BIA) that Section 309(c)(5)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2196, precludes a grant of suspension of deportation to petitioner under former 8 U.S.C. 1254(a) (1994).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Appiah v. *United States INS*, 202 F.3d 704 (4th Cir.), cert. denied, 531 U.S. 857 (2000)	13-14, 17
Ashki v. *INS*, 233 F.3d 913 (6th Cir. 2000)	17
Astrero v. *INS*, 104 F.3d 264 (9th Cir. 1996)	9, 16
Castillo-Perez v. *INS*, 212 F.3d 518 (9th Cir. 2000)	13
Gonzalez-Torres v. *INS*, 213 F.3d 899 (5th Cir. 2000)	10, 12, 17
Guadalupe-Cruz v. *INS*, 240 F.3d 1209 (9th Cir. 2001)	12
LaGuerre v. *Reno*, 528 U.S. 1153 (2000)	14
McBride v. *INS*, 238 F.3d 371 (5th Cir. 2001)	10
N-J-B-, In re:	
21 I. & N. Dec. 812 (BIA 1997)	5, 16
Interim Dec. 3415, 1999 WL 1390344 (A.G. July 10, 1997)	5
Nolasco-Tofino, In re, Interim Dec. 3385, 1999 WL 261565 (BIA Apr. 15, 1999)	6
Otarola v. *INS*, 270 F.3d 1272 (9th Cir. 2001)	12
Pinho v. *INS*, 249 F.3d 183 (3d Cir. 2001)	17
Reno v. *Goncalves*, 526 U.S. 1004 (1999)	14
Reno v. *Navas*, 526 U.S. 1004 (1999)	14
Sibanda v. *INS*, 282 F.2d 1330 (10th Cir. 2002)	12, 17
Stone v. *INS*, 514 U.S. 386 (1995)	16

Cases—Continued: Page

Tefel v. *Reno*, 530 U.S. 1228 (2000) 14
Vargas-Gonzalez v. *INS*, 647 F.2d 457 (5th Cir. 1981) 3

Statutes and regulation:

Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 16
Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, § 101(h), Tit. IX, § 902(b), 112 Stat. 2681-538 6-7
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, as amended by Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2193 2
§ 309(a), 110 Stat. 3009-625 ..... 2, 5
§ 309(c)(1), 110 Stat. 3009-625 ..... 4, 14, 15, 16
§ 309(c)(4), 110 Stat. 3009-626 ..... 14, 15, 16
§ 309(c)(5), 110 Stat. 3009-627 11
§ 309(c)(5), 111 Stat. 2196 ..... 4, 14, 16, 17
§ 309(c)(5)(A), 111 Stat. 2196 ..... 5, 6
§ 309(c)(5)(C), 111 Stat. 2196-2198 ..... 4, 5, 9, 10, 11, 12, 13, 15, 17
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*: 6
8 U.S.C. 1227(a)(3)(B)(iii) 7
8 U.S.C. 1229(a) 3
8 U.S.C. 1229b 3, 13
8 U.S.C. 1229b(a) 3
8 U.S.C. 1229b(b) 3
8 U.S.C. 1229b(d) 14, 15
8 U.S.C. 1229b(d)(1) 3, 4, 9, 10
8 U.S.C. 1251(a)(2)(1994) 2
8 U.S.C. 1251(a)(3) (1994) 2
8 U.S.C. 1251(a)(3)(B)(iii) (1994) 7, 8

Statutes and regulation—Continued:

	Page
8 U.S.C. 1251(a)(4) (1994)	2
8 U.S.C. 1251(a)(5) (1988)	7
8 U.S.C. 1254(a) (1994)	2, 3, 11, 13
8 U.S.C. 1254(a)(1) (1994)	2, 8
8 U.S.C. 1254(a)(2) (1994)	2, 8, 9
Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2193	5
§ 202(b)(1), 111 Stat. 2194	6
§ 203(a)(1), 111 Stat. 2196	5
§ 203(f), 111 Stat. 2200	6
18 U.S.C. 1546	7, 8
8 C.F.R. 3.1(h)(1)(i)	5

In the Supreme Court of the United States

No. 01-1362

TAREK ELAGAMY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A23) is unpublished, but the judgment is noted at 281 F.3d 1279 (Table). The decisions of the immigration judge (Pet. App. A1-A8) and the Board of Immigration Appeals (Pet. App. A9-A20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2001. A petition for rehearing was denied on January 29, 2002. Pet. App. A24. The petition for a writ of certiorari was filed on March 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before the amendments to the Immigration and Nationality Act (INA) enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident (LPR). 8 U.S.C. 1254(a) (1994).[1] Such relief was available in the discretion of the Attorney General. To qualify for consideration, the alien was required to demonstrate, *inter alia*, that he had been physically present in the United States for a continuous period of "not less than seven years immediately preceding the date of such application [for relief]," 8 U.S.C. 1254(a)(1) (1994), or, in the case of an alien deportable under 8 U.S.C. 1251(a)(2), (3) or (4) (1994), "not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation," 8 U.S.C. 1254(a)(2) (1994).[2] Under pre-IIRIRA law, the time that an alien spent in deportation proceedings before issuance of a final order of deportation was counted towards the requirement of seven or ten years' continuous physical presence in the United States.

---

[1] Unless otherwise indicated, references in this brief to Title 8 of the United States Code are to the current (2000) edition of that title. References to earlier editions of Title 8 are so designated in the brief.

[2] The alien was also required to demonstrate that he was of good moral character, and that his deportation would result in "extreme hardship," or, in the case of an alien deportable under 8 U.S.C. 1251(a)(2), (3) or (4) (1994), "exceptional and extremely unusual hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) and (2) (1994).

See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

On September 30, 1996, Congress enacted IIRIRA. In IIRIRA, Congress abolished the old distinction between deportation and exclusion proceedings, repealed the provision for suspension of deportation in former 8 U.S.C. 1254(a) (1994), instituted a new form of proceeding known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal." See 8 U.S.C. 1229(a), 1229b. Under the last provision, the Attorney General may in his discretion cancel the removal of an alien who has not been convicted of certain enumerated offenses, if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is an LPR) or has been continuously present in the United States for ten years (if the alien is not an LPR). 8 U.S.C. 1229b(a) and (b).

For purposes of eligibility for cancellation of removal, however, the alien's continuous residence or physical presence in the United States is "deemed to end * * * when the alien is served a notice to appear," 8 U.S.C. 1229b(d)(1), not (as under prior law) when the alien's application for relief is finally adjudicated. The Notice to Appear is the document that commences removal proceedings under IIRIRA, and replaces the old Order to Show Cause (OSC), which commenced deportation proceedings under the INA before IIRIRA. See 8 U.S.C. 1229(a). Thus, IIRIRA instituted a new rule (known as the "stop-time" rule), under which the commencement of removal proceedings cuts off the time that is counted towards establishing an alien's eligibility for cancellation of removal, and the time that an alien subsequently spends in removal proceedings is not counted.

The new cancellation-of-removal provisions were generally not made applicable to aliens whose immigration proceedings were commenced prior to April 1, 1997, the general effective date of IIRIRA. Rather, most new provisions of IIRIRA were made applicable only to removal proceedings instituted after a transition period, which ended on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. IIRIRA did, however, contain a special "transitional rule with regard to suspension of deportation," which provided that the new stop-time rule was to apply to "notices to appear" issued before, on, or after the date of enactment of IIRIRA, *i.e.*, September 30, 1996. Specifically, Section 309(c)(5) of IIRIRA originally provided:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [(8 U.S.C. 1229b(d)] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

110 Stat. 3009-627.

b. After enactment of IIRIRA, aliens in deportation proceedings argued that the new stop-time rule of 8 U.S.C. 1229b(d)(1) did not apply to proceedings commenced before the general April 1, 1997, effective date of IIRIRA. That argument was based on the language in IIRIRA Section 309(c)(5)(A) directing that the new stop-time rule be applied in cases in which a "notice to appear" had been issued. Under deportation proceedings initiated before IIRIRA's effective date, no document known as a "notice to appear" existed, and proceedings were commenced by an Order to Show Cause.

On February 20, 1997, the Board of Immigration Appeals (BIA) rejected that argument, and held that, effective September 30, 1996, IIRIRA's new stop-time rule applies to all pending and future deportation proceedings, including those commenced before IIRIRA was enacted. *In re N-J-B-*, 21 I. & N. Dec. 812 (BIA 1997). The BIA first held that the stop-time rule became effective on IIRIRA's enactment date of September 30, 1996, rather than on IIRIRA's general effective date of April 1, 1997. *Id.* at 814-815. The BIA further concluded that the term "notice to appear" in IIRIRA Section 309(c)(5)(A) referred generically to a document initiating proceedings, and that, because Section 309(c)(5)(A) expressly referred to such a document "issued before, on, or after" IIRIRA's enactment date, it necessarily included an Order to Show Cause issued before that date. *Id.* at 817-819. On July 10, 1997, Attorney General Reno, exercising her authority under 8 C.F.R. 3.1(h)(1)(i), vacated the BIA's decision in *N-J-B-* and certified the case to herself for her review and determination. See *In re N-J-B-*, Interim Dec. 3415, 1999 WL 1390344 (A.G. July 10, 1997).

c. On November 19, 1997, while *N-J-B-* was still pending before the Attorney General, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, Tit. II, 111 Stat. 2193. Section 203(a)(1) of NACARA amended IIRIRA Section 309(c)(5) to make clear that the stop-time rule of IIRIRA applies even to deportation proceedings opened before April 1, 1997, by service of an Order to Show Cause (rather than a Notice to Appear). NACARA Section 203(a)(1) amended IIRIRA Section 309(c)(5) to read in part as follows:

> (A) IN GENERAL.— * * * [P]aragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [(8 U.S.C. 1229b(d)] (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2196 (emphasis added). Section 203(f) of NACARA also made that amendment effective as if included in the original enactment of IIRIRA. 111 Stat. 2200. In *In re Nolasco-Tofino*, Interim Dec. 3385, 1999 WL 261565 (BIA Apr. 15, 1999), the BIA held that, under the NACARA amendment, the new stop-time rule applies to deportation proceedings that were pending at the time of IIRIRA's enactment (except in the cases of certain aliens who qualified for a statutory exemption), regardless of the nature of the initiating document.[3]

---

[3] NACARA created an exception to the new stop-time rule for certain qualifying aliens from El Salvador, Guatemala, and Eastern Europe. That exception allowed qualified nationals of those countries to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence stopped at the time that an Order to Show Cause was served on them. See NACARA § 203(a)(1) (adding new IIRIRA § 309(c)(5)(C)), 111 Stat. 2196-2198. NACARA also provided certain Nicaraguan nationals with another, broader form of relief. NACARA provided qualified Nicaraguans the opportunity to apply directly for adjustment of status to LPR, without the need also to apply for suspension of deportation (including the need to show that deportation would cause hardship). See NACARA § 202(b)(1), 111 Stat. 2194. A similar privilege was extended to certain Haitian nationals in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, § 101(h), Tit. IX,

2. Petitioner is a native and citizen of Egypt who entered the United States on May 15, 1982, as a non-immigrant student, authorized to remain in the United States until December 31, 1985. Certified Administrative Record (C.A.R.) 8, 790-793. On September 19, 1983, petitioner adjusted his status to that of a lawful permanent resident (LPR) based upon a marriage to a United States citizen that was later proven to be fraudulent. C.A.R. 8. 790, 793. On September 10, 1986, petitioner was convicted in the United States District Court for the Eastern District of Louisiana of making a false statement under oath in violation of 18 U.S.C. 1546, based on false statements he had made to the Immigration and Naturalization Service (INS) regarding his fraudulent marriage. C.A.R. 8, 742, 790-791. Petitioner was sentenced to a suspended term of five years' imprisonment, and was placed on five years' probation. C.A.R. 742.

On December 17, 1986, petitioner was placed in deportation proceedings by the filing of an OSC. C.A.R. 791-792. The OSC was personally served on petitioner on the same day. C.A.R. 792. The OSC charged petitioner with being subject to deportation pursuant to 8 U.S.C. 1251(a)(5) (1988), based on his conviction under 18 U.S.C. 1546. C.A.R. 791-792.[4]

At a deportation hearing held on April 20, 1988, an immigration judge found petitioner deportable as

---

§ 902(b), 112 Stat. 2681-538. Citizens of Egypt, such as petitioner, were not granted special relief from the stop-time rule.

[4] At the time petitioner's deportation proceeding was commenced, Section 1251(a)(5) of Title 8 rendered deportable any alien "convicted under section 1546 of title 18." See 8 U.S.C. 1251(a)(5) (1988). That basis of deportability was subsequently transferred to 8 U.S.C. 1251(a)(3)(B)(iii) (1994), and now appears at 8 U.S.C. 1227(a)(3)(B)(iii).

charged and denied his applications for asylum and withholding of deportation. Pet. App. A2-A8. The BIA affirmed that decision on June 24, 1992. *Id.* at A9-A13.

On August 9, 1993, petitioner filed a motion to reopen with the BIA, requesting the discretionary relief of suspension of deportation pursuant to 8 U.S.C. 1254(a)(2) (1994). C.A.R. 463-476. On February 9, 1995, the BIA denied petitioner's motion, holding that he had not satisfied the statutory requirement of ten years' continuous physical presence following his offense, which, according to BIA precedent, commences on the date of the alien's conviction for the offense rendering him deportable, not, as petitioner argued, from the date of the alien's commission of that offense.[5] Pet. App. A14-A17. Petitioner filed a petition for review with the United States Court of Appeals for the Fifth Circuit, which was denied on August 22, 1995. 68 F.3d 465 (Table). This Court denied petitioner's petition for a writ of certiorari on January 16, 1996. 516 U.S. 1071 (1996).

On September 17, 1996, petitioner filed another motion to reopen with the BIA, again seeking suspension of deportation. C.A.R. 5-20. On March 17, 1997, the BIA denied petitioner's motion based on its

---

[5] Under Section 1254(a)(2), an alien was required to show that he had been "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." Petitioner was required to apply for suspension of deportation under the more stringent rules of 8 U.S.C. 1254(a)(2) (1994), rather than those of 8 U.S.C. 1254(a)(1) (1994), because he had been convicted of an offense under 18 U.S.C. 1546, which, at the time he applied for suspension, was chargeable as a basis for deportation under 8 U.S.C. 1251(a)(3)(B)(iii) (1994).

ruling in *N-J-B-* that IIRIRA's new stop-time rule applied in all deportation proceedings immediately upon IIRIRA's enactment. Pet. App. A18-A20. The BIA rejected petitioner's argument that it should follow the Ninth Circuit's decision in *Astrero* v. *INS*, 104 F.3d 264 (1996), in which that court held that the new stop-time rule did not become effective until IIRIRA's general effective date of April 1, 1997. The BIA noted that it had already rejected that interpretation of IIRIRA Section 309(c)(5)(A) in *N-J-B.* Pet. App. A20 n.1. Accordingly, the BIA concluded that petitioner was statutorily ineligible for suspension of deportation because he had not accrued the requisite ten years' continuous physical presence in the United States before he was served with the OSC commencing his deportation case.[6] *Id.* at A19-A20.

3. On April 8, 1997, petitioner filed a petition for review of the BIA's decision in the United States Court of Appeals for the Fifth Circuit. In his opening brief, petitioner argued that the BIA erred in *N-J-B-* when it held that IIRIRA's new stop-time rule applied to deportation proceedings commenced before IIRIRA was enacted. Petitioner also argued that, even if he had not accrued the requisite seven years' continuous physical presence before he was served with the OSC in 1986, he had accrued a new period of seven years' continuous physical presence after he was served with the OSC, which made him eligible for suspension of deportation.

---

[6] Petitioner was convicted of a deportable offense on September 10, 1986, and was served with an OSC on December 17, 1986. Thus, for purposes of his eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(2) (1994), petitioner had accumulated only three months' continuous physical presence, as that term is defined in 8 U.S.C. 1229b(d)(1), by the time he was served with the OSC. See C.A.R. 8, 790-793.

After petitioner filed his opening brief, the court of appeals granted several motions to stay the briefing schedule. In April 2001, petitioner filed a reply brief in which he argued for the first time that the new stop-time rule did not become effective until IIRIRA's general effective date of April 1, 1997, or 15 days after the BIA decided his case.

In an unpublished decision issued on November 29, 2001, the court of appeals denied the petition for review. Pet. App. A21-A23. The court first deemed petitioner's challenge to *N-J-B-* to be abandoned because (it stated) petitioner had not presented any legal analysis or authority to support his contentions. *Id.* at A22. The court further held that petitioner's argument that he had accumulated ten years' physical presence after the service of the OSC was foreclosed by its prior decision in *McBride* v. *INS*, 238 F.3d 371 (5th Cir. 2001), which upheld the BIA's decision that IIRIRA's stop-time rule prohibits the restarting of the accrual time-period after deportation proceedings have begun. Pet. App. A22. Finally, the court ruled that petitioner's contention that IIRIRA's stop-time provisions may not be retroactively applied to his case was foreclosed by its prior decision in *Gonzalez-Torres* v. *INS*, 213 F.3d 899 (5th Cir. 2000).

ARGUMENT

Petitioner urges this Court to grant review to resolve the very narrow issue whether IIRIRA Section 309(c)(5)(A), which provides for the application of the stop-time rule of 8 U.S.C. 1229b(d)(1) to transitional deportation cases instituted before IIRIRA's enactment, became effective on IIRIRA's enactment date of September 30, 1996, or on IIRIRA's general effective date of April 1, 1997. See Pet. 7. That issue affects only a very limited class of aliens—*viz.*, aliens whose

applications for suspension of deportation, a form of relief that Congress has prospectively repealed, were denied by the BIA based on the stop-time rule during a six-month period that ended over five years ago. Only one court of appeals has addressed that precise issue in a published decision. With the passage of time, it is increasingly unlikely that the issue will arise in other courts of appeals. Moreover, even though the court of appeals' conclusion in the unpublished decision below conflicts with the decision of the Ninth Circuit in *Astrero*, the construction of IIRIRA Section 309(c)(5)(A) by the BIA and the court of appeals in the instant case is correct. Accordingly, further review is not warranted.

1. a. The court of appeals' decision on the effective date of the stop-time rule of IIRIRA Section 309(c)(5)(A) is of little continuing importance. That issue affects only those aliens who sought to apply for suspension of deportation, pursuant to former 8 U.S.C. 1254(a) (1994), and whose applications were denied by the BIA on the basis of the stop-time rule between September 30, 1996 and March 31, 1997. The majority of those aliens were required, under IIRIRA Section 309(c)(4), to file petitions for review within 30 days of any such final order of deportation issued during that time. See 110 Stat. 3009-626.[7] Thus, the effective-date issue is almost entirely a closed one and remains an ongoing controversy only to the extent that such

---

[7] Aliens whose final deportation orders were issued before October 31, 1996, were required to file petitions for review within 90 days of the issuance of the final order, or, in the case of an alien convicted of an aggravated felony, within 30 days of the issuance of the final order. See IIRIRA § 309(c)(4), 110 Stat. 3009-626.

petitions for review remain open and pending in the courts of appeals after five years.

b. The Ninth Circuit's decision in *Astrero* v. *INS*, 104 F.3d 264 (1996), is the only published court of appeals decision squarely addressing the issue whether IIRIRA Section 309(c)(5) became effective on IIRIRA's enactment date of September 30, 1996, or on IIRIRA's general effective date of April 1, 1997. The effective-date issue arose in *Astrero* because that case was argued to and decided by the court of appeals after IIRIRA was enacted but before April 1, 1997.[8] Although the Ninth Circuit has since extended its holding in *Astrero* to apply to certain suspension of deportation cases heard by an immigration judge between September 30, 1996, and April 1, 1997, even when the alien was finally ordered deported by the BIA *after* April 1, 1997, those cases involve a very limited set of unusual circumstances and do not elevate the issue of the effective date of the stop-time rule of IIRIRA Section 309(c)(5)(A) to one of continuing national importance.[9] At most, this issue affects only the narrow

---

[8] In *Gonzalez-Torres*, the alien was ordered deported by the BIA on May 17, 1999, more than two years after IIRIRA's general effective date. See 213 F.3d at 901. Thus, the issue whether IIRIRA's stop-time rule became effective before April 1, 1997, was not squarely before the court or the BIA in that case. In *Sibanda* v. *INS*, 282 F.3d 1330 (10th Cir. 2002), the BIA initially ruled, before April 1, 1997, that the alien was ineligible for suspension of deportation because of the stop-time rule. After April 1, 1997, the Tenth Circuit remanded the case to the BIA, which again applied the stop-time rule to bar the alien's application for relief. The Tenth Circuit subsequently affirmed, holding that "the stop-time rule unambiguously applies to orders to show cause issued before, on, or after September 30, 1996." *Id.* at 1333.

[9] See *Otarola* v. *INS*, 270 F.3d 1272 (9th Cir. 2001) (remanding case where INS filed what that court termed a "frivolous appeal"

and finite group of aliens whose suspension of deportation applications were adjudicated by an immigration judge or the BIA between September 30, 1996, and April 1, 1997.

c. Even if the issue whether the stop-time rule of IIRIRA Section 309(c)(5)(A) became effective on September 30, 1996, or April 1, 1997, might still arise on occasion in future cases, the application of that stop-time rule affects only aliens who sought to apply for suspension of deportation, pursuant to former 8 U.S.C. 1254(a) (1994), in deportation proceedings commenced under pre-IIRIRA law. For removal proceedings commenced on or after April 1, 1997, suspension of deportation has been repealed and replaced by a new form of relief known as "cancellation of removal," which is subject to different substantive terms of eligibility. See 8 U.S.C. 1229b. Thus, the issue in this case concerns only deportation proceedings affected by IIRIRA's transitional rules, and does not implicate any removal proceedings under the permanent provisions of IIRIRA.

The category of aliens who are subject to IIRIRA's transitional rules is steadily diminishing in number and will be depleted when the aliens in that group complete their administrative proceedings. The Court has denied several certiorari petitions raising issues that arise only under the transitional rules of IIRIRA, including two

---

of the immigration judge's pre-April 1, 1997 determination that the stop-time rule was not yet effective); *Guadalupe-Cruz* v. *INS*, 240 F.3d 1209, 1212 (9th Cir. 2001) (remanding case where immigration judge committed "serious procedural error" in holding that stop-time rule applied before April 1, 1997); *Castillo-Perez* v. *INS*, 212 F.3d 518 (9th Cir. 2000) (remanding case where alien received ineffective assistance of counsel in proceedings before immigration judge before April 1, 1997).

petitions raising similar issues involving the application of the stop-time rule in transitional cases. See *Appiah* v. *INS*, 531 U.S. 857 (2000); *Tefel* v. *Reno*, 530 U.S. 1228 (2000); see also *LaGuerre* v. *Reno*, 528 U.S. 1153 (2000); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999); *Reno* v. *Navas*, 526 U.S. 1004 (1999). There is no basis in this case for a different result.

2. a. The decisions of the BIA and the court of appeals, holding that IIRIRA Section 309(c)(5) was made effective immediately upon IIRIRA's enactment to pending cases, are correct. Section 309(a) of IIRIRA provides that, in general, the effective date for Title III-A of IIRIRA (Sections 301-308) is April 1, 1997, the "title III-A effective date." See IIRIRA 309(a), 110 Stat. 3009-625. IIRIRA Section 309(a) qualifies that general rule by providing, *inter alia*, that, "*[e]xcept as provided in this section* * * * this subtitle and the amendments made by this subtitle" shall take effect on April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625 (emphasis added). IIRIRA Section 309(c)(1), which establishes transition rules for "aliens in proceedings," also states that the provisions in IIRIRA Title III-A, including the new stop-time rule of 8 U.S.C. 1229b(d), "shall not apply" to "an alien who is in * * * deportation proceedings [before] the title III-A effective date [April 1, 1997]." 110 Stat. 3009-625.[10] But IIRIRA Section 309(c)(1) in turn qualifies that general rule regarding effective dates by making it "[s]ubject to the

---

[10] As initially enacted, IIRIRA Section 309(c)(1) provided that the amendments made by IIRIRA Title III-A would not apply to aliens in deportation proceedings "as of" the Title III-A effective date. See 110 Stat. 3009-625. Congress subsequently amended IIRIRA Section 309(c)(1) to replace "as of" with "before." For a discussion of the significance of that amendment, see pp. 15-17, *infra*.

succeeding provisions forth in this subsection [*i.e.*, IIRIRA Section 309(c)]." IIRIRA § 309(c)(1), 110 Stat. 3009-625.

This case involves one of those "succeeding provisions," set forth at IIRIRA Section 309(c)(5)(A) (as amended by NACARA Section 203(a)(1)), which specifically provides that the new stop-time rules of "[p]aragraphs (1) and (2) of [8 U.S.C. 1229b(d)] * * * shall apply to orders to show cause * * * issued before, on, or after the date of the enactment of [IIRIRA]." 111 Stat. 2196. Consequently, as a qualification to the general rule of IIRIRA Section 309(c)(1) that amendments made by IIRIRA Title III-A do not apply before April 1, 1997, the transitional rule of IIRIRA Section 309(c)(5)(A) applies immediately to pending cases of aliens, like petitioner, who were in proceedings before April 1, 1997.

That point is reinforced by the fact that the statute specifically provides that it shall apply broadly to orders to show cause issued "before, on, or after the *date of the enactment*" of IIRIRA. 111 Stat. 2196 (emphasis added). Congress's choice of IIRIRA's date of enactment as a reference point indicates that it intended the transitional stop-time rule to become effective immediately upon IIRIRA's enactment date of September 30, 1996. Had Congress intended the transitional provision not to be given effect until April 1, 1997, it would have referred to IIRIRA's "title III-A effective date" in Section 309(c)(5)(A), as it had elsewhere in IIRIRA (including Section 309(a)), rather than to IIRIRA's "date of enactment."

b. The Ninth Circuit's contrary application of IIRIRA Section 309(c)(5)(A) in *Astrero* is incorrect. In *Astrero*, the Ninth Circuit held that IIRIRA's new stop-time rule did not render the alien in that case

ineligible for suspension of deportation because, according to the court, under IIRIRA Section 309(a), the stop-time rule did not become effective until April 1, 1997. *Astrero*, 104 F.3d at 266.

As the BIA pointed out in *N-J-B-*, however, the Ninth Circuit erroneously relied on a superseded version of IIRIRA Section 309(c)(1) in reaching that conclusion. See *N-J-B-*, 21 I. & N. Dec. at 816 & n.6. The Ninth Circuit's decision was predicated on the language of IIRIRA Section 309(c)(1) as originally enacted, which provided that, subject to the succeeding provisions in that subsection, the new rules of IIRIRA Title III-A were not to be applied to aliens who were in deportation proceedings "*as of*" IIRIRA's effective date, April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625 (emphasis added). On October 11, 1996, however, Congress amended IIRIRA Section 309(c)(1) by replacing "as of" with "before." See Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657.

By replacing "as of" with "before," Congress made clear that IIRIRA Section 309(c)(5)'s transitional rule was to be applied to all aliens who were placed in deportation proceedings "before" April 1, 1997, even if the alien's administrative proceedings were also completed before April 1, 1997. See *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its enactment to have a real and substantial effect."). Before that amendment, the "as of" language of IIRIRA Section 309(c)(1) might have suggested that the new rules would not take effect until April 1, 1997, when it could be determined which aliens were in deportation proceedings "as of" that date. In light of the amendment to that provision, however, it is clear that Congress intended the new method of measuring continuous physical presence to be applied

immediately upon enactment to all aliens in deportation proceedings "before" April 1, 1997—including petitioner.

c. Finally, although no court of appeals other than the Ninth Circuit in *Astrero* has ruled on the specific issue whether the stop-time rule of IIRIRA Section 309(c)(5)(A) applies in the case of an alien such as petitioner, whose case was adjudicated by the BIA before April 1, 1997, every other court of appeals to address issues involving the effective date of IIRIRA Section 309(c)(5) has stated that that provision became effective on September 30, 1996, IIRIRA's enactment date. See *Sibanda* v. *INS*, 282 F.3d 1330, 1333 (10th Cir. 2002) ("[T]he language Congress employed makes the stop-time measure universally applicable to orders to show cause issued before, on, or after IIRIRA's enactment date."]; *Pinho* v. *INS*, 249 F.3d 183, 188 (3d Cir. 2001) ("The plain meaning of [Section 309(c)(5) and the amendments made by NACARA] establishes Congress's intent to apply the stop-time rule to all cases, including those pending as of September 30, 1996."); *Ashki* v. *INS*, 233 F.3d 913, 917 (6th Cir. 2000) ("IIRIRA section 309(c)(5) * * * took effect immediately upon enactment."); *Gonzalez-Torres*, 213 F.3d at 903 (upholding "application of the IIRIRA's stop-time provision to deportation proceedings pending at the time of the statute's enactment"); *Appiah* v. *United States INS*, 202 F.3d 704, 707-708 (4th Cir.) ("After IIRIRA's enactment, the initiation of deportation proceedings stops the clock—an alien can no longer accrue years of continuous physical presence once proceedings have begun."), cert. denied, 531 U.S. 857 (2000). As we have explained, the Ninth Circuit's sole deviation from that otherwise uniform line of authority

has little prospective significance. Accordingly, this Court's review is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
LINDA S. WERNERY
Attorneys

MAY 2002